COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1619-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

WILLIAM FAISON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

WEDEMEYER, P.J. William Faison appeals from a judgment entered after a jury convicted him of first-degree intentional homicide and first-degree reckless injury, contrary to §§ 940.01(1) and 940.23(1), STATS. He also appeals from an order denying his postconviction motion seeking sentence modification. Faison claims: (1) the trial court erroneously exercised its

sentencing discretion; (2) the trial court erred in finding the lineup was not impermissibly suggestive; (3) the evidence was insufficient to support first-degree intentional homicide; and (4) the trial court erroneously admitted testimony of a police officer regarding the meaning of an urban slang phrase. Because the trial court did not erroneously exercise its sentencing discretion, because the lineup photos are not a part of the record on appeal, because the evidence was sufficient to support the jury's verdict, and because the trial court did not erroneously exercise discretion in admitting the challenged testimony, we affirm.

I. BACKGROUND

On July 27, 1996, Faison attended a party uninvited. While at the party, he broke a window and an argument ensued. Faison and the victim, Donandre Bolden, continued the argument outside. Someone handed Faison a gun. Faison threatened to kill Bolden. Bolden said he was not afraid to die. Faison said he was not afraid to see that happen, aimed the gun at Bolden and fired from only a few inches away. Bolden was shot in the shoulder and chest. He died shortly thereafter from loss of blood due to the bullet wound in his chest. William Price was shot through his right arm as he was attempting to push Bolden away.

Faison was charged with first-degree intentional homicide for the death of Bolden and first-degree reckless injury for the shooting of Price. The jury convicted on both counts. Faison was sentenced to life in prison with no parole eligibility for forty years on the intentional homicide count, and seven years consecutive with ten-year probation stayed on the reckless homicide count. Faison filed a postconviction motion seeking modification of his sentence. The trial court denied the motion. Faison now appeals.

II. DISCUSSION

A. Sentencing.

Faison claims the trial court erroneously exercised its sentencing discretion by failing to consider mitigating factors, i.e., that the shooting was spontaneous, unplanned and partially provoked by the victim, and that the sentence was too harsh given Faison's young age and lack of adult criminal history. Our review reveals that the trial court did not erroneously exercise its sentencing discretion.

It is well-settled that the trial court exercises discretion in sentencing and, on appeal, review is limited to determining if discretion was erroneously exercised. *See* ***State v. Echols***, 175 Wis.2d 653, 681, 499 N.W.2d 631, 640 (1993). The primary factors to be considered by the trial court are the gravity of the offense, the character and rehabilitative needs of the offender, and the need to protect the public. *See* ***id.*** The trial court has discretion to weigh the various aggravating and mitigating factors to determine an appropriate sentence. *See* ***State v. Hamm***, 146 Wis.2d 130, 154, 430 N.W.2d 584, 595 (Ct. App. 1988).

The record demonstrates that the trial court properly considered the relevant factors. The trial court did consider Faison's lack of adult criminal record, and the mitigating and aggravating factors. The trial court noted that Faison did demonstrate some work history. The trial court viewed the circumstances of the crime, however, as an aggravating factor. In its postconviction decision, the trial court stated that the confrontational nature of the argument that resulted in the death of one and serious injury of another required community protection from this type of activity. The trial court also focused on the "extreme nature" of the offenses, referring to the evidence and testimony at trial. Thus, the proper factors were considered.

Further, we cannot say the sentence imposed was unduly harsh. A sentence is harsh and excessive when it is "so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). The sentence imposed here does not rise to this level. Faison was found guilty of killing one victim and seriously injuring another. The circumstances leading up to the shooting also support the sentence imposed. Faison broke a window at a party he attended uninvited. An argument resulted. Instead of walking away, Faison shot, killed and injured unarmed persons. Under these circumstances the sentence imposed is not "shocking".

B. Lineup.

Faison claims the trial court erred in finding that the lineup identification was not impermissibly suggestive. He contends that the five-person lineup was impermissibly suggestive because none of the other participants was physically similar to Faison. Specifically, he claims that only one of the other lineup participants was bald, like himself, but that that individual had a much lighter complexion. The trial court ruled that despite this contention, the other participants in the lineup were not so different from Faison that he was unfairly accentuated as a suspect.

Because Faison has failed to include the challenged photographs in the record on appeal, we assume that they support the trial court's finding. *See* ***Austin v. Ford Motor Co.***, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979) (in the absence of a transcript, an appellate court will assume that every fact essential

to sustain the trial court's exercise of discretion is supported by the record).[1] Thus, we affirm the trial court's determination that the lineup was not impermissibly suggestive.

C. Insufficient Evidence.

Faison next claims that the evidence is insufficient to support the jury's finding that he was guilty of first-degree intentional homicide. He argues that he did not "intend to kill" Bolden because he shot Bolden in parts of the body that would not strike major organs and that, in essence, the shots did not kill Bolden, but that Bolden died when he ran from the scene because his heart pumped blood into the chest cavity. We are not persuaded.

In reviewing a challenge to the sufficiency of the evidence, we will not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990).

An intent to kill cannot be clearer than when a defendant expressly states that he intends to kill the victim moments before he does so. *See* ***Fells v. State***, 65 Wis.2d 525, 535, 223 N.W.2d 507, 513 (1974). Witnesses testified that Faison clearly stated that he intended to kill Bolden just prior to firing the fatal shots. Further, Faison shot Bolden in the chest and shoulder from inches away.

[1] We note that Faison claims to have included these photos in the record on appeal. We have reviewed the specific appeal documents that Faison claims contain the photos as well as the record as a whole and are unable to locate the lineup photos in the record on appeal.

When a defendant shoots the victim from close range in a vital part of his body, it can reasonably be inferred that the shot was fired with intent to kill. *See* ***State v. Webster***, 196 Wis.2d 308, 322-25, 538 N.W.2d 810, 815-16 (Ct. App. 1995).

Faison's express intention to kill Bolden, together with the evidence demonstrating that Faison shot Bolden in the chest from inches away, is sufficient to support the jury's verdict of first-degree intentional homicide.

D. Testimony of Police Officer Interpreting Urban Slang Phrase.

Faison's last contention is that the trial court erred in allowing Detective Gary Temp to explain to the jury the meaning of the phrase, "what's up now, nigger." A witness indicated that Faison had said this to Bolden while Faison was pointing the gun at Bolden.

Temp testified that the phrase meant "what are you going to do now that I have the gun," and the phrase intended to "throw[] it back to the other guy to see what he's going to do and he has the power because he has the gun." Faison's counsel objected to this testimony if Temp was testifying as to what Faison intended, but indicated that there was no objection if Temp was merely offering an opinion as to the meaning of the phrase. Temp clarified that he was testifying only about the meaning of these words.

Faison argues that Temp's testimony was speculative and should have been excluded. A trial court has broad discretion in admitting and excluding evidence. *See* ***State v. Pepin***, 110 Wis.2d 431, 435, 328 N.W.2d 898, 900 (Ct. App. 1982). When we review a discretionary decision, we examine the record to determine if the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that

a reasonable judge could reach. *See* ***State v. Rogers***, 196 Wis.2d 817, 829, 539 N.W.2d 897, 902 (Ct. App. 1995).

The trial court did not erroneously exercise its discretion in admitting this evidence. This testimony was admissible under § 907.02, STATS.[2]

Temp testified that he had worked for the Milwaukee Police Department for seventeen years and investigated three hundred to four hundred homicides. When he was interviewing a witness who attributed the urban slang to Faison, Temp said he did not ask for an explanation as to what the phrase meant because he already knew the meaning. He testified that any detective, prosecutor or defense attorney would probably know the meaning of these words.

In other words, because of Temp's specialized knowledge gained after investigating crimes in general, and homicides, specifically over the last seventeen years, he knew the meaning of this term. It is reasonable to infer, however, that at least some of the members of the jury would not know what this phrase meant, which is why the prosecutor asked Temp to explain the meaning of the phrase. Section 907.02, STATS., permits such explanation and the trial court's ruling allowing the testimony was not improper.

Temp's testimony was not speculative because it is clear from the record that Temp was explaining the meaning of the term, not what Faison specifically intended in using those words.

[2] Section 907.02, STATS., provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. *(concurring).* Although I believe the majority has reached the right result, I have serious misgivings about the preparation and presentation of Judge Wedemeyer's opinion. Therefore, while I concur in the conclusions, I do not join in the majority opinion.